United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

74-2255

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P/S

United States Court of Appeals

For the Second Circuit.

In the Matter of the Arbitration between

INTSEL CORPORATION,

Petitioner-Appellee,

-against-

M. W. ZACK METAL COMPANY,

Respondent-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

PETITION FOR RE-HEARING AND SUGGESTION OF AN EN BANC HEARING THEREON.

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4

TABLE OF CONTENTS

Authorities and Statutes

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

In the Matter of the Arbitration between INTSEL CORPORATION, Petitioner-Appellee -against- M.W. ZACK METAL COMPANY, Respondent-Appellant.	:	Docket No. 74-2255

Petition for Re-hearing and suggestion of an En Banc hearing thereon.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT:

The Petition of M.W. Zack Metal Company to this Honorable Court respectfully shows:

FIRST: That petitioner is the appellant from an order and judgment of the United States District Court for the Southern District of New York, made by the Hon. Murray I. Gurfein, confirming an award by a single arbitrator, and, denying vacature of such award on cross-motion of the appellant to vacate. Vacature was claimed among other grounds because the arbitrator had exceeded his powers in ignoring the proof of four agreements, in picking the first contract in point of time as the contract entitled to the award when, by the terms of the second contract, the first had been terminated, in ignoring the fourth contract, which was a novation agreement and which terminated all previous contracts; by failing to apply New York law as provided by the contracts stipulating

the arbitration, and by ignoring the lack of a dispute for him to resolve in the matter of interpreting the sales contracts appointing an arbitrator or in the manner of the execution of those same sales agreements.

SECOND: This court made its order dated March 13, 1975 affirming the order appealed from "on the opinion of Judge Gurfein dated May 9, 1974,"

THIRD: The order affirmed, it is respectfully suggested, did not resolve the question presented by appellant but determined the one advanced by appellee, viz; that a district court may not set aside an award for errors of law and of fact finding.

FOURTH: Appellant's point was that the errors made by this arbitrator went to his powers of appointment and whether he had the power to award as he did, not whether his power being admitted or proved, he had executed his powers properly.

FIFTH: It is respectfully submitted that the order appealed from does not resolve appellant's point; instead, it misapprehended the facts upon which appellant's claim was made and overlooked the applicable law set down by our Supreme Court in Wilko v. Swan, 346 U.S. 427; and in the United Steelworkers trilogy of cases, 363 U.S. 564; 363 U.S. 576; and 363 U.S. 592 where the Supreme Court said that where an arbitrator is obliged to follow a particular law but does not, the award must be vacated. Because, the Supreme Court said, that an arbitrator may not disregard the law that he is required to apply or the limits of the contract disputes referred to him;

see pp. 12-16, 31 and 32 of Appellant's brief. This point is elaborated upon by showing later Circuit Court of Appeals decisions following the Supreme Court and by showing the concurrance of the Court of Appeals of the State of New York in the same principle by statements of Chief Judge Fuld in Matter of National Cash Register Co. (Wilson), 8 N.Y. (2) 377, stating that an excess of power is manifested when the arbitrator is guilty of "making a completely new contract for the parties", or give the contract a "completely irrational" interpretation. At the same page of the brief are citations to three Appellate Division decisions adopting Judge Fuld's rule.

SIXTH: Appellant firmly believes that involved is a question of exceptional importance to meet the requirements of Rule 35 (b) of the Rules of Appellate Procedure because the award disregards the limitation of the Supreme Court upon the powers of an arbitrator and yet, the district court refused to consider the facts that were before the arbitrator showing such excess of power because it claimed it could not review an arbitrator's findings.

SEVENTH: The result was that a new contract was made by the arbitrator finding liability for goods when none existed under the proven facts.

EIGHTH: The distinction between when to examine the proof before the arbitrator and when not is, or might be, a difficult one to determine, but a real distinction appears because due process of law is accorded in the case where disputes as to termination, cancellation or a novation has occurred

which would put an end to the arbitrator's powers, but not in the case where the termination, cancellation or novation claimed to put an end to an arbitrator's power are proved by facts that are conceded, admitted or uncontroverted. An award against the conceded, admitted or uncontroverted facts must necessarily be an arbitrary decision and not supported by the proof. Such a decision would deny a litigant his "day" in court. Hilton v. Guyot, 159 U.S. 113. A denial of due process may not be excused by considerations of speed or convenience or any other desirable purpose to arbitration. The limit was reached here, and the decision of district court should not have been affirmed.

NINTH: The facts tell the story and show by the conceded, admitted and uncontroverted evidence before the arbitrator that there was no dispute which he could resolve and in making an award, he exceeded his powers by making a new contract and by refusing to apply the law he was required to apply.

There was no transcript of the hearing. Appellant asked about a stenographer at the start of the hearing, but the arbitrator said that it was unusual to have a stenographer take down the evidence at an arbitration and he continued with the hearing without trying to ascertain if a transcript would be required. Nevertheless, there is no dispute that the contracts were put in evidence as were the shipping documents. Nor is there any dispute that only a Mr. Fifield testified for appellee and that he said that he had no personal knowledge of the transaction, although he was the vice-president of the department; that his first knowledge of the matter was late in 1970 or early

1971. Nor is there a dispute that for appellant, both Mr. Zack, president, and Mr. Krasnov, Zack's New York representative who had dealt with appellee for Zack, testified as to their knowledge of the events they had engaged in.

On the motion to vacate, appellant relied upon the exhibits before the arbitrator, attaching some of them to the papers and referring to others, particularly those in Intsel's possession, by describing their contents. Also, Zack's affidavits recounted, as faithfully as possible, the oral testimony of Zack and Krasnov.

These facts are that Zack is a metal broker, at Detroit, Michigan. Intsel, the appellee, is also a metal broker but in New York City. Only, Intsel is part of a group of French companies called Pechiney, among which are metal fabricating mills. Intsel buys and sells with the components of the group and is the go between with those outside the group. Both Zack and Intsel have been doing business with each other for years. In 1968, Zack was asked by a customer in Detroit, Fox Manufacturing Co., if he could supply an aluminum tubing to government specifications, which Fox needed for a government contract. Zack called his New York representative, Krasnov, who called Intsel. Intsel passed the specification on to one of its mills. The mill said it could manufacture the tubing and an agreement was reached on 40,000 lbs. of the tubing in four sizes with 10,000 lbs. allocated to each size. Zack wrote its purchase order of January 7, 1969 and Intsel wrote its confirmation of sale to Zack of January 13, 1969, for these 40,000 lbs. (See Ex. 2 and 3, pp. 50 and 51 of Appendix.)

It is important to note that this confirmation to Zack was part of some sort of pad arrangement with carbons between the several forms in the pad, so that copies of the face sheet was made on forms that served different purposes. One was the form that went to Zack and another form containing the identical description of the goods went to Intsel's mill in France in confirmation of its purchase from the mill. Intsel would thus buy what it had sold using identical descriptions of the goods in the separate confirmations. However, the two counterparts differed. In the confirmation of the sale to Zack, the name of the mill is not shown and the price and terms of payment on the purchase from the mill are not shown (see Ex. 1, 3 and 6 and Ex. at p. 115). Yet, all three missing items are shown on Intsel's confirmation of purchase to its mill (see Exs. A, B, 5, 117). These differences are important, principally, because they have wrought confusion in this case. In a short time after the January contract, the mill said it was unclear as to the specifications and asked for a sample. A sample was obtained and sent to them. Intsel was told by its mill that they could copy the sample but it was agreed that only a trial order of 10,000 lbs. would be attempted. Intsel issued a change order dated March 14, 1969 and sent a confirmation to Zack (see the Exhibit at p. 115 of the appendix). That particular document is an Intsel writing. It was offered to the arbitrator by Intsel, it was conceded by Zack. The arbitrator deemed it unnecessary to mark it in evidence.

The 10,000 lbs. were fabricated, shipped, delivered to Fox, who approved and the shipment was paid for. This, too, is conceded.

Next, it is conceded that Zack, on June 18, 1969, ordered 55,000 lbs. more of several specification of the tubing. See Ex. 2. Intsel confirmed the sale to Zack by Ex. 3. These documents required delivery on the first 15,000 lbs. , a.s.a.p., obviously meaning as soon as possible. The balance was for September arrival at Detroit. Also, it is conceded that in the back of Intsel's confirmation were certain clauses. Important were the arbitration clause, which is No. 9; the clause requiring construction of the contract in accordance with the laws of the State of New York which is clause 3; the prohibition against modification unless in writing which is clause 5; and clause 1, which states that each shipment is a separate sale, p. 8a, App.

Also important is to note that Intsel's confirmation of the June sale, Ex. 3, states with regard to its first four items, which are the four items of the January contract that item 1 of the January order was cancelled; item 2 of the January contract was increased by the June contract to 15,000 lbs. and it was included in the June contract; item 3 of the January contract was shipped, and item 4 of the January contract was cancelled. This left nothing to be done under the January contract. Hence, the January contract could not be the basis of an award. The January contract was terminated by appellee in writing; Ex. 3. Yet, it was the basis of the

award, (see the award Exhibit C, p. 9).

Next, on July 29, 1969, Zack ordered 10,000 lbs. of aluminum rods which sale was accepted by Intsel by its confirmation of August 7, 1969. Shipment was to be made at the same time as the tubing purchased in June, viz; September arrival at Detroit. (See Exhibits 4 and 6).

Next, the first 15,000 lbs. of the June order which should have been shipped a.s.a.p., had not arrived by September 1, 1969, and Krasnov said he checked on the whole shipment in September. Krasnov testified before the arbitrator, unopposed, that he called Mernick almost daily, beginning early in September, and sometimes several times during the day about the date of shipment, urging the arrival as agreed. Mernick could not get a shipping date out of the mill and he could not promise Krasnov any shipping date. Approaching the end of September, Krasnov told Mernick to telex the mill that Zack would cancel if a shipping date was not fixed immediately. Still no shipping date was forthcoming. Krasnov reported his failure to get a firm shipping date, let alone a promised delivery for September to Zack. Zack told his customer, Fox, who cancelled and covered himself elsewhere. Zack told Krasnov to cancel. Krasnov called Mernick and told him that Zack's customer had cancelled and he was cancelling Zack's contract with Intsel.

These conversations of Krasnov with Mernick remain uncontroverted. No one from Intsel came forward to deny them. In fact, Intsel's Mr. Fifield said he knew nothing of the

details of the transaction. He limited his testimony to the identification of papers. He identified the telexes with his mill in France showing Intsel's effort at buying the goods from the mill and he identified the telexes Mernick had exchanged in September with the mill trying to get a delivery or shipping date. One of such telexes was identified by Krasnov as the one which was supposed to have stated Zack's threat to cancel, but which read, instead, that Zack was angry, (p. 116). Also, Mr. Fifield identified some of the January documents and, at first, said that Exhibit A was the contract between Intsel and Zack whereas Exhibit A was Intsel's confirmation of its purchase from its own mill. When that was called to his attention, he admitted that fact. Also, he testified that on every contract of purchase and sale, time was of the essence of the contract. Zack reported Fifield's testimony to the court below. Intsel never denied a single detail of what was reported to the district court.

Some two months after Krasnov had cancelled the contract, Zack received shipping documents from Intsel showing that there were three shipments on board three ships arriving about November 25, 1969 with the goods. Requests for payment as per contract terms accompanied these shipping documents (see Ex. 7).

Zack called Intsel direct. He spoke with Mr. Vic Besso, whom Mr. Fifield had identified as an executive vice-president and superior to him. Zack rejected the tender of delivery and recalled that Krasnov had cancelled back in

September for their failure to deliver as agreed. Zack said that he had lost his customer, he had no use for the goods. Mr. Besso asked could he move the goods anyway. Detroit, with its many manufacturing concerns would be a better market for such goods. Perhaps Fox might get a re-order for his government contract. Zack said he would try. It was agreed that the writings no longer counted and the goods would be taken in free of the contract price, stored by Zack pending sale, and they would be sold for Intsel's account.

The goods then were entered by Intsel and released to Zack, free. These details were handled by Besso's assistant, a Mr. Romano. Zack picked up the goods on December 11, 1969, according to the shipping receipts. This pick-up and the subsequent attempt at selling the goods and storing them meanwhile could not spell out an obligation to pay for the goods, but it was the consideration for the offer of Besso to clear the goods through customs and deliver them to Zack for sale for their own account. This new arrangement created a valid contract of novation, and when Zack took in the goods and tried to sell them, he had performed his part of the bargain. Thus, the novation was executed. The law of New York on novation appears at p. 17 of appellant's brief.

Both Besso and Romano were and are employed at Intsel, but they did not take the stand to testify and Zack's testimony, establishing the novation, stands uncontroverted. What is worse, by the hearing date, Intsel had received a copy of appellant's memorandum to the arbitrator which claimed

the novation and still, neither Besso nor Romano were brought to the hearing to testify. A copy of this memorandum is attached to document 9 of the Record on Appeal.

When Fifield entered the picture and found that the goods were unsold, he took action. On March 31, 1971, or fully 15 to 16 months after the novation, he caused a bill for the contract price to be sent to Zack. Zack wrote back for shipping instructions for the goods which never came. This late billing is not proof of an obligation, it is rather corroborative of the fact that the transfer of possession to Zack had been free of the purchase price payable on delivery.

Under the foregoing facts under New York law, which the arbitrator was required to apply, a novation had occurred. There was no evidence of an extension of time for delivery. Such a modification would have to be in writing, and there was no such writing claimed or produced. The lateness of the tender of delivery cannot be hidden or overlooked. It is evidenced, also, by Intsel's writings offered in evidence before the arbitrator in the form of shipping documents. There was no testimony from Intsel of an acceptance of the late delivery. Zack said a rejection was accepted by Besso for Intsel and a new deal made. Inasmuch as the written contracts provided for the application of New York law and under New York law such a novation operated to discharge the written contracts, the refusal to apply New York law was an excess of power by the arbitrator. He cannot refuse to apply the law negotiated for by the parties within the very contract which also provides for arbitration. Otherwise, he exceeds his

authority. The parties bargained for New York law, not for the brand of law that an arbitrator would wish to apply.

Also, there was an excess of power by the failure of the arbitrator to accept the conceded, admitted and uncontroverted evidence that there were no disputes arising out of the contracts of which he was appointed arbiter.

TENTH: The district court was unwilling to examine the facts apparently unaware that where a claim is made, that the arbitrator had no power to decide the way he did, it was its duty to examine the facts before the arbitrator. The court said only that no manifest disregard for the law was demonstrated and then he went on to say that a district court will not review an alleged erroneous finding of an arbitrator. Yet, the facts were placed before the court. All of the aforementioned facts appeared in the affidavits in support of the cross-motion to vacate. The appellee in responding to the cross-motion did not deny a single fact. Yet, it submitted an affidavit by its counsel at the hearing, Mr. Schwartz, who also was a witness/ which said, "It is Intsel's position that the parties having agreed to arbitration *** the legal issues on the merits may not be opened. Therefore, so as not to burden the court with voluminous papers which are irrelevant to the issues in this proceeding, Intsel does not submit herewith its own detailed account of its case before the arbitrator and the evidence that was presented." In no wise does Intsel claim that the facts spelled out a liability upon Zack to pay for the goods. Assuming that there was a dispute without proof of it and assuming that it arose out of the contract to be arbitrated,

Intsel argued that the court could not review the decision of the arbitrator. The court adopted the latter view and, of course, this court has, too. Yet, both court decisions violate the mandate of the Supreme Court as is stated above.

ELEVENTH: Another error of the arbitrator that is apparent but overlooked is the fact that the arbitrator awarded on the January contract. He said, "I, the undersigned arbitrator, having been designated in accordance with the arbitration agreements entered into by the above named parties, and dated January 13, 1969 and August 7, 1969 *** award as follows***. As seen above, the January contract was superseded by operation of law by Intsel's own writing of June 23, 1969. This error was made worse by Intsel's petition to confirm by attaching thereto as Exhibit A as the agreement the arbitrator was claimed to have relied on. Yet, Exhibit A is Intsel's confirmation of purchase sent to its own mill in France, and which Fifield agreed on cross-examination was not sent to Zack and was not to be binding on Zack. Isn't this clear evidence of the arbitrator re-writing the contract for the parties?

TWELFTH: Another important question of law is, Wasn't it error for the district court to have decided the matter on motion instead of holding a trial on the appellant's claim that there was evidence before the arbitrator which made his award an unlawful exercise of power. If the district court did not believe appellant's statements of what evidence was before the arbitrator or found that Intsel had submitted evidence showing that appellant's claims were denied, should

it have, nevertheless, set the matter down for trial. This point is expounded under Point II of Appellant's brief. At least, under the facts before the district court, there should have been a trial of what was before the arbitrator so that the main question could have been properly decided.

THIRTEENTH: Questions of whether an arbitrator has exceeded his powers and of whether the losing party's rights under Article 10 of the Arbitration Act granting him what is tantamount to some assurance to a fair trial before the arbitrator by giving him the right to claim entitlement to a vacature when excess of power appears, are the most important functions of our courts in overseeing the work of arbiters and insuring that their decisions be within well defined bounds rather than have them free to decide as they will. A litigant should not be required to go to the Supreme Court to ask for this relief, but this court, as the leading circuit court in our country, should take the lead and clarify how the Supreme Court's decisions in the Steelworker's cases may be implemented in the district court. In the interest of justice, this court would do well to hold that the facts before the arbitrator are the criteria for determining whether an arbitrator has exceeded his powers and a trial should be had when a loser presents such a case, unless it may be decided summarily as in Rule 56 FRCP provided.

FOURTEENTH: The undersigned counsel affirms that this petition is made in good faith and in the firm belief that serious error has been made. No delay or other form of harrasment is intended. Counsel apologizes to the panel of

this court hearing the argument and to Judge Gurfein for disagreeing with them, but involved is a basic concept of due process. It is not enough to make a court available and to allow one to put in his evidence and so assume that that constitutional guarantee was granted. The arbitrator must examine the evidence faithfully. If the arbitrator stashes it away, and doesn't look at it, then the guarantee is broken. Mr. Justice Gray, in Guyot v. Hilton, supra, gave us an illustration of a court in action failing to meet our constitutional requirements. The Conflicts of Laws rules set out in the Restatement of the Law, 2nd, Sections 25 and 105 state that a court not following the rules of the court designed to afford a litigant due process, invalidates its judgment. Plain usurpation of power by a court having jurisdiction invalidates its decision, our Supreme Court has held in Koch v. Feuerstein; 308 U.S. 433; c/f Smith v. U.S. 403 F.(2) 448.

WHEREFORE this court is respectfully requested to consider the foregoing points and to grant re-argument either by the panel or en banc or reverse itself and vacate the award as requested in appellant's brief.

Dated, New York, N.Y.
March 20, 1975.

Respectfully submitted,

ANTHONY B. CATALDO
Attorney for Appellant

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of March, 1975 deponent served the within Petition upon Weil, Gotshal + Manges

attorney(s) for Appellee

in this action, at 767 - 5th Ave.
New York NY 10022

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
24 day of March, 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976